No. 13892

United States Court of Appeals
FOR THE NINTH CIRCUIT.

JOHN ALAN TOMLINSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

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Cases Cited

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May It Please the Court:

What has been stated in the reply briefs for appellant in *Basil Leroy Sterrett* v. *United States of America,* No. 13901, and in *Joseph David Triff* v. *United States of America,* No. 13952, filed in this Court, will not be repeated here. The Court will be referred to information in those briefs. Appellant, however, desires to make reply to the brief of appellee.

I.

The appellee argues erroneously, at pages 8 and 10 of its brief, that the character of the registrant is involved. This has been adequately answered in the reply brief in the *Sterrett* case under Point I.

II.

The appellee argues, at page 9 of its brief, that it is necessary for the registrant to satisfy the board that he is entitled to the exemption claimed. All that the registrant must do is to satisfy the law by the undisputed facts. If the board is not satisfied by undisputed facts that satisfy the law, then there is no basis in fact for the classification. The registrant is not bound by the decision even though he cannot satisfy the board. See also what has been said on this question in the *Sterrett* reply brief under Point II.

III.

The appellee argues, at page 8 of its brief, that because Tomlinson will defend himself he is not entitled to claim conscientious objections to war in any form. This has been answered in the reply brief for appellant in the companion case of *Joseph David Triff* v. *United States of America,* No. 13952, filed in this Court, under Point III. See also *Annett* v. *United States,* 205 F. 2d 689 (10th Cir. June 26, 1953); and *United States* v. *Pekarski,* 207 F. 2d 930 (2d Cir. Oct. 23, 1953), followed in *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. Dec. 7, 1953), and *United States* v. *Hartman,* — F. 2d — (2d Cir. Jan. 8, 1954).

IV.

The appellee argues, at page 8 of its brief, that only those who are opposed to war in any form are entitled to classification as conscientious objectors. This argument was rejected in *Taffs* v. *United States, supra;* and *United States* v. *Hartman, supra.* See also *Annett* v. *United States, supra;* and *United States* v. *Pekarski, supra.*

V.

The appellee says, at page 9 of its brief, that conscientious objections are to be determined only by objective standards. Regardless of what standards are employed they are to be gauged by the statute and the regulations. The appellant satisfies the definition of "conscientious objector" appearing in the statute and the regulations.

VI.

The argument is made by the appellee, at page 10 of its brief, that there is no denial of procedural due process upon the personal appearance. It is said by the appellee that the appellant had the opportunity to state his case fully. It is not contended that the board deprived Tomlinson of his right to say anything. Appellant contends that the draft board violated the law when it held that he could not be a minister unless he attended a theological school. See appellant's main brief at pages 27 to 30.

VII.

It is argued by appellee, at page 11 of its brief, that the appeal board made a new classification that cured the error of the local board. This fallacious argument was condemned in *United States* v. *Zieber,* 161 F. 2d 90 (3rd Cir.); *United States* v. *Laier,* 52 F. Supp. 392 (N. D. Calif. S. D.); *United States* v. *Romano,* 103 F. Supp. 597 (S. D. N. Y.); *Davis* v. *United States,* 199 F. 2d 689 (6th Cir.); *Bejelis* v. *United States,* 206 F. 2d 354 (6th cir.).

VIII.

Appellee contends, at pages 12-13 of its brief, that Tomlinson waived his right to complain about the failure of the hearing officer to give him a summary of the FBI report because he did not ask for the summary. The hearing officer waived the requirement that Tomlinson request the unfavorable evidence. The hearing officer testified at the trial that in every case where there was adverse information he

always told the registrant about it and attempted to summarize the unfavorable evidence. See appellant's main brief at pages 7-8. Since he did this, the appellee is out of place in contending that there was no request for the unfavorable information.—*United States* v. *Stasevic,* No. C. 142-143, Southern District of New York, December 17, 1953.

IX.

It is argued by the appellee at page 13 of its brief, that no error was committed when the trial court refused to allow the secret investigative report to be used at the trial. The order of the court below is in conflict with the following cases: *United States* v. *Evans,* 115 F. Supp. 340 (D. Conn. Aug. 20, 1953); *United States* v. *Stull,* Cr. No. 5634, Eastern District of Virginia, November 6, 1953; *United States* v. *Brussell,* No. 3650, District of Montana, November 30, 1953; *United States* v. *Parker* and *United States* v. *Broadhead,* Nos. 3651, 3654, District of Montana, December 2, 1953; *United States* v. *Stasevic,* No. C. 142-143, Southern District of New York, December 17, 1953.

X.

Appellee argues that the denial of the right to use the FBI report is harmless error. This argument ignores the case of *Kotteakos* v. *United States,* 328 U. S. 750.

The administrative law cases cited by the appellee on harmless error are not authority for what constitutes error in the judicial body. What may be harmless error before an administrative agency may be the grossest sort of injustice in the judicial arena. There is no comparison between standards of due process in the administrative agency and the judicial body. Hearsay is permitted in the administrative agency; it can never be allowed in court when objected to. This is especially true in criminal cases in view of the constitutional right of the confrontation of witnesses.

CONCLUSION

It is submitted that the judgment of the court below should be reversed and the appellant ordered acquitted.

Respectfully,

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